

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TWANDA BAXTER	:	CIVIL ACTION
	:	
v.	:	
	:	
KFC NATIONAL MANAGEMENT CO.,	:	
KENTUCKY FRIED CHICKEN STORE	:	
# Y062113, and	:	
ZURICH AMERICAN INSURANCE CO.	:	NO. 98-2311

M E M O R A N D U M

WALDMAN, J.

September 15, 1998

Presently before the court is plaintiffs' Motion for Remand in this slip-and-fall case. Plaintiff is suing KFC National Management Company and an individual KFC fast-food restaurant in Philadelphia for injuries allegedly sustained when plaintiff fell in the KFC restaurant's parking lot, as well as KFC National's insurer, Zurich American Insurance Company, for its alleged bad faith in refusing to compensate plaintiff for her injuries.

Plaintiff sued defendants in the Court of Common Pleas of Philadelphia. Citing original diversity jurisdiction, defendant KFC National Management filed a notice of removal 29 days after service upon defendant Zurich American and 25 days after being served itself. Defendant Zurich American joined in the notice of removal 21 days after it was filed and thus more than 30 days after service on either defendant. Putting aside

the contested status of the individual KFC restaurant, the removal petition is facially defective for failure of all properly served defendants to join in the removal within 30 days of initial service. See Balazik v. County of Dauphin, 44 F.3d 209, 213 (3d Cir. 1995); Getty Oil Corp. v. Insurance Co. of North America, 841 F.2d 1254, 1262-63 (5th Cir. 1988); Michaels v. State of N.J., 955 F. Supp. 315, 320-21 (D.N.J. 1996); Ogletree v. Barnes, 851 F. Supp. 184, 186-87 & n.3 (E.D. Pa. 1994). This defect, however, is procedural and not jurisdictional. As plaintiff did not assert the defect in her motion for remand, it appears that she has waived it. See Page v. City of Southfield, 45 F.3d 128, 133 (6th Cir. 1995); Balazik, 44 F.3d at 213-14 & n.5; Michaels, 955 F. Supp. at 321.

Plaintiff does assert that the jurisdictional amount of \$75,000 is not satisfied and that not all of the defendants are diverse. The removing party bears the burden of proving that subject-matter jurisdiction exists. See Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied 498 U.S. 1085 (1991); Omega Sports, Inc. v. Sunkyoung America, Inc., 872 F. Supp. 201, 202 (E.D. Pa. 1995).

Plaintiff seeks compensatory damages "in an amount in excess" of \$50,000 and punitive damages "in excess" of \$10,000,000. Punitive damages demands are considered in assessing whether the jurisdictional amount has been met. See

Bell v. Preferred Life Assu. Soc., 320 U.S. 238, 240 (1942);
Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1046 (3d Cir.),
cert. denied sub nom Upp v. Mellon Bank, N.A., 510 U.S. 964
(1993); Burkhardt v. Contemporary Svcs. Corp., 1998 WL 464914, *3
(E.D. Pa. Aug. 7, 1998); Feldman v. New York Life Ins. Co., 1998
WL 94800, *4 (E.D. Pa. Mar. 4, 1998); Fumo v. Kay, 1997 WL
430999, *2 (E.D. Pa. July 18, 1997). The punitive damages demand
aside, the amount in controversy is not measured by the low end
of an open-ended claim but rather by a reasonable reading of the
value of the rights being litigated. Angus v. Shiley, 989 F.2d
142, 146 (3d Cir. 1993). It fairly appears that plaintiff, who
alleges she sustained a "disabling injury," has pled a claim with
a potential value in excess of \$75,000.

Defendants' citizenship cannot be determined from the
pleadings. Plaintiff asserts that the KFC defendants are
"residents" of Pennsylvania. KFC National Management states that
it is a Delaware corporation with a principal place of business
in Kentucky and that Kentucky Fried Chicken Store # Y062113 does
not exist as an independent legal entity.

KFC National Management, however, failed to produce
with its petition for removal or its response to plaintiff's
motion for remand any affidavit or record evidence from which the
court can conscientiously ascertain its citizenship or the legal
status and citizenship of the defendant restaurant. A removing

party must demonstrate the existence of removal jurisdiction. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 359 (3d Cir.), cert. denied, 516 U.S. 1009 (1995); Warner v. Mutual Life Ins. Co. of New York, 998 F. Supp. 592, 594 (E.D. Pa. 1998). Unsupported statements by counsel as to a defendant's citizenship "are not enough." Leiblinger v. Saks Fifth Avenue, 612 F. Supp. 872, 874 (N.D. Ohio 1985) (quoting Jerro v. Home Lines, Inc., 377 F. Supp. 670, 672 (S.D.N.Y. 1974)).

Further, several days after the removal petition was filed, plaintiff filed in state court an amended complaint adding as non-diverse party defendants the individual owners or franchisees of the KFC restaurant at which plaintiff was injured. Although the amendment was ineffective because of the removal, plaintiff has clearly indicated in her submission in support of a remand her intent to join these parties in this action. It is inconceivable that they would not be added. These individuals appear to be critical, if not literally necessary, parties to the litigation. Thus, even if properly removed the case would be remanded because of plaintiff's desire reasonably and logically to join additional non-diverse defendants. See 28 U.S.C. § 1447(e); Wright, Miller & Cooper, Federal Practice and Procedure: Civil § 3739, at 441-42 (3d ed. 1998). See also Stransky v. American Isuzu Motors, Inc., 829 F. Supp. 788, 790 (E.D. Pa.

1993); Morze v. Southland Corp, 816 F. Supp. 369, 370 (E.D. Pa. 1993) (remanding case where plaintiff's remand motion evidences desire to join non-diverse franchisee of property at which she fell and injured herself.)

Even accepting KFC National's counsel's unsupported statement regarding the citizenship of his client, the removing defendants have presented no competent evidence to refute plaintiff's assertion that the KFC restaurant is a legal entity with non-diverse citizenship. Also, plaintiff reasonably seeks to join two non-diverse defendants. Accordingly, plaintiff's motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of September, 1998, upon
consideration of plaintiff's Motion for Remand and the response
thereto, consistent with the accompanying memorandum, pursuant to
28 U.S.C. §§ 1447(c) and 1447(e), **IT IS HEREBY ORDERED** that said
Motion is **GRANTED**, and accordingly the above action is **REMANDED**
to the Court of Common Pleas of Philadelphia.

BY THE COURT:

JAY C. WALDMAN, J.